No. 09-977

JUN 8 - 2010

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY
and BROWN & WILLIAMSON HOLDINGS, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

I. THE UNPRECEDENTED USE OF THE FRAUD STATUTES TO PUNISH UNDISPUTEDLY CORE POLITICAL SPEECH REQUIRES REVIEW

It is undisputed that Defendants' speech (except for the "lights" descriptors) was core political speech about matters of public concern and/or intended to influence government regulation, not commercial speech of lesser constitutional protection. For the first time ever, the judicial and executive branches have imposed draconian remedies on such public-policy speech under fraud statutes with criminal penalties (and the executive branch seeks in this Court to add a $280 billion penalty).

Equally troubling, the prospective "remedy" for such speech discriminates on the basis of viewpoint and compels Defendants to espouse the Government's viewpoints in major media outlets. For example, while the Government and corporations profiting from smoking cessation devices may say that scientific evidence conclusively establishes that secondhand smoke causes cancer in nonsmokers, Defendants may not express a contrary opinion despite reputable "scientific opinion casting doubt on the dangers of secondhand smoke," Pet. App. 50a. The First Amendment's fundamental purpose is to prevent the Government from so "driv[ing] certain ... viewpoints from the marketplace," *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991), by "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). This is

particularly true for "speech on public issues" that "occupies the highest rung of the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

The Government contests none of this and nowhere disputes that suppression of such speech would require the Court's immediate review and correction. Rather, like the courts below, it changes the subject by urging that government may restrict a different species of speech: fraud. That is, government may restrict speech "proposing a commercial transaction," *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980), *if* the speech constitutes a *knowingly false* assertion of *fact intended* and *likely* to obtain the victim's "money or property." Pet. 11-14; 18 U.S.C. §§ 1341, 1343. Accordingly, the cert-worthiness and constitutional validity of the decision below indisputably turns on whether the speech here may be so penalized as "fraud." It cannot be because (1) the fraud exception to the First Amendment does not extend to speech about matters of public concern or potential regulation and (2) even if the exception were applicable, there was and can be no proper finding of the elements of "fraud."

Since the decision below obliterated these restrictions and transformed the fraud statutes into a powerful weapon for the Government to penalize and proscribe public policy opinions, the Court's review is needed to eliminate this threat. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984) ("[I]ndependent review of the record [is needed] to be sure that the speech in question actually falls within the unprotected category").

A. The Panel Eviscerated Fundamental Constitutional and Statutory Speech Protections

1. On the threshold point, the Government does not dispute that "[t]his is the first case anywhere that extended the fraud statutes to reach industry or company statements about matters of public concern." Pet. 6. Significantly, it also does not dispute that the decision below, if uncorrected, will authorize the Government to bring similar, politically motivated fraud prosecutions of the energy or transportation industries for denying their products' effect on global warming, because the denials are "deliberately misleading" since they are inconsistent with "internal corporate knowledge." *See* Pet. 9-10; Pet. App. 32a-41a.

Such an unprecedented expansion of the fraud statutes to punish and proscribe public policy speech intended to forestall threatened "government regulation," Pet. App. 1540a, requires this Court's review. In *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), the lower court's expansive definition of "commercial speech" *potentially* reached statements that were "part of a public dialogue on a matter of public concern" if the statements involved the company's "own business operations." *Id.* at 657 (Stevens, J., concurring). At least five Justices opined that, at a minimum, punishing such "false" statements raised "importan[t]" and "difficult First Amendment questions" because such speech "represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance." *Id.* at 663; *see also id.* at 681-82 (Breyer, J., dissenting) (allowing suit to proceed without Court's resolution would "seriously erode the federal

constitutional policy in favor of free speech" because of "chilling effect" on "commercial speakers."); *id.* at 665, (Kennedy, J., dissenting). *A fortiori*, the Court's intervention is necessary here because it is *undisputed* that liability (except for "lights") is premised on noncommercial speech concerning public controversies and potential regulation.

This is particularly true because the court below held, in conflict with five other circuits, that *Noerr-Pennington* speech may be punished if it is "misleading" under the fraud statutes. The Government concedes that the decision below found that *Noerr-Pennington* does "not protect deliberately ... misleading statements." Pet. App. 44a. Thus, all agree that, under the decision below, the Government may punish speech challenging the President's preferred policies, if a single district court (or a jury in a criminal case) finds that it is "deliberately misleading." Significantly, speech is "deliberately misleading" under this definition if it is a "half truth" or "misleading omission," even if not "literally false." Pet. App. 55a.

The Government's concession that the D.C. Circuit denied First Amendment protection to deliberately misleading *Noerr-Pennington* speech in the political arena confirms the conflict with five other circuits that squarely held *Noerr-Pennington* does protect deliberately false political speech. Pet. 18. Although the Government does not dispute that circuit split, it suggests that *Noerr-Pennington* is inapposite on a ground neither argued nor adopted below—that *Noerr-Pennington* applies only to "antitrust" statutes. Opp. 47. But the D.C. Circuit rejected *Noerr-Pennington* protection because the speech was deliberately misleading, not because Defendants were sued under a non-antitrust statute,

so its holding applies to all federal statutes and squarely conflicts with the other circuits' decisions.

Moreover, there is no reasonable ground for concluding that the First Amendment "right to petition" recognized under *Noerr-Pennington* trumps only antitrust laws. This Court and lower courts have routinely applied *Noerr-Pennington* to non-antitrust laws, including RICO. *See, e.g., BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 526 (2002) (NLRA); *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006) (RICO).

On the merits, the D.C. Circuit is wrong in holding that the First Amendment authorizes the Government to extirpate "half truths" and "misleading omissions" from the political marketplace of ideas. Pet. App. 55a. *Noerr* itself involved a "malicious and *fraudulent*" and "reprehensible" effort to "*deliberately deceive*[] the public and public officials" through a financially motivated disinformation campaign "aptly characterized by the District Court as involving 'deception of the public.'" *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 133, 140, 145 (1961) (emphases added). Contrary to the Government's notion, Opp. 48, immunizing such speech in no way immunizes *perjury* or lying *to* public investigative officials, because "[m]isrepresentations, *condoned in the political arena*, are not immunized ... in the adjudicatory process." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *see* Pet. 18.

2. Even if public-policy and *Noerr-Pennington* speech could be punished as "fraud," the speech here does not satisfy the elements of fraud. In a transparent effort to evade the deficiencies in the

analysis of those elements below, the Government focuses almost exclusively on the (admittedly more plausible) criticisms of Defendants' long-ceased denials that smoking causes disease, thereby obscuring the nonexistent support for findings concerning secondhand smoke, addiction, etc. (Nor can Defendants be liable for the "causation" statements upon which the Government fixates, because they were not material and there is no likelihood of such future statements (much less RICO violations). *See* Pet. 19-20.)

a. Specific Intent — Even if "deliberately false" public-policy or *Noerr-Pennington* speech could constitutionally be punished, there is no finding here that any speaker deliberately spoke falsely. The Government cannot cite a single finding by the district court that any individual knowingly uttered a falsehood and does not dispute that the Government affirmatively eschewed seeking to prove such individual fraudulent intent, because it was "immaterial" under its "collective corporate intent" theory. *See* Pet. 27-29; RJR Pet. App. 32a, 43a. Like the D.C. Circuit, the Government brazenly revises the district court's opinion, claiming it endorsed the correct "individualized intent" standard, even though it expressly adopted the "collective corporate intent" standard at least six times and derided the individualized standard as "creat[ing] an insurmountable burden." Pet. App. 1982a; *see also id.* at 1973a, 1979a, 1985a. But even assuming the district court *recognized* the correct legal standard (as it did with the "money or property" requirement) the dispositive point is that it never *applied* this standard by making the requisite individualized

intent findings (just as it never applied the "money or property" standard, *see* pp. 9-10, *infra*).

Since the consequences of such "reckless disregard" findings are so draconian—rendering fully protected speech unprotected—and since the "chilling effect" of penalizing unintentionally false speech destroys robust public debate, the Court has insisted that such findings be independently reviewed by appellate courts and be well supported by the record. *See Bose*, 466 U.S. at 499; *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968). Yet the Government asks the Court to leave in place a finding of deliberate falsity absent any *allegation* or specific district court *finding* that any individual uttered such a knowing falsehood, even though the appellate court shirked its independent review obligation and held that deliberate falsity is established merely because it could "*reasonably* be *expected*" that the speaker saw contrary information. *See* Pet. App. 34a-35a (emphasis added). Particularly since the decision below expressly ensnares corporate "opinions" about legitimate debates, (*see* pp. 10-11, *infra*), corporations would routinely be found to have "fraudulent intent" under this slipshod analysis, because there will virtually always be some internal studies or employees supporting the Government's view.

Indeed, the D.C. Circuit found fraudulent intent even where the speaker could *not* "reasonably be expected" to be aware of allegedly "inconsistent ... internal knowledge ... of the corporation." Pet. App. 34a-35a. It imputed to the Tobacco Institute—a separate entity responsible for most of the identified "fraudulent" statements (*see* Pet. 26)—the purely *internal* knowledge of the defendant *corporations*, despite the district court's own explicit finding that "Defendants never provided the Tobacco Institute

with information" concerning cigarettes' "addictive" and harmful nature (Pet. App. 661a, Pet. 26) and absent any finding that Defendants *did* convey any such knowledge, solely because Defendants "created" Tl. Opp. 44 n.14; Pet. App. 9a. Of course, the *Wall Street Journal* could not be held liable for defaming a public figure because its owner "knew" the assertion to be false, absent explicit findings that he conveyed this to the *Journal*. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964). Moreover, as then-Judge Alito explained, it "lies far outside the bounds of established First Amendment law" on associational freedom to penalize members of a trade association for the association's "fraudulent misrepresentation[s]" unless the member "specifically intended to further" such misrepresentations. *In re Asbestos Sch. Litig. Pfizer, Inc.*, 46 F.3d 1284, 1289-90 & n.4 (3d Cir. 1994).

At a minimum, deliberate falsehoods cannot be *found*, under the Due Process Clause or the First Amendment, unless they are *alleged*, and the Government implicitly concedes that it disavowed any allegation of individual specific intent. Incredibly, the Government's sole defense is that, for some inexplicable reason, Defendants had "every ... incentive" to defend against a theory disavowed by their opponent. Opp. 45. But *defendants* only *defend* against allegations advanced by plaintiffs, which is why the federal rules require plaintiffs to put defendants on notice of their claims, *e.g.*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947-48 (2009), and why Due Process forecloses finding defendants liable on theories never advanced by plaintiffs. *See* Pet. 27-29. No rational defense lawyer would seek to *disprove* "actual malice" if a libel plaintiff did not allege it.

b. Money or Property — In an effort to suggest that the speech here is within the fraud statutes and "resembles" lesser-protected commercial speech, the Government asserts that both lower courts found that Petitioner's speech was "designed to deprive [tobacco] consumers of money or property." Opp. 38; *but see Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("Protected speech does not become unprotected merely because it resembles the latter."). This is false, as evidenced by the Government's inability to cite a single sentence in either opinion stating that the statements were intended to obtain money or property. (The D.C. Circuit completely ignored this threshold statutory requirement, and the district court never *analyzed* it after once citing it. Pet. App. 1971a.) Similarly, neither decision remotely suggests that the "fraudulent" speech was "commercial speech" entitled to lesser constitutional protection.

The Government seeks to fill this gaping void by citing the district court's finding that Defendants intended to deceive the "general public," including "smokers and potential smokers," which it suggests is equivalent to finding that the falsehoods were intended to deprive those smokers of money. Opp. 38 (citing Pet. App. 1960a). But these are not equivalent, and treating them as equivalent would eviscerate the First Amendment's protection of speech about public policy and regulation, as this Court has noted. Virtually *all* corporate speech about public policy or pending regulation is directed at the "public," which necessarily includes existing and potential customers of the company's products. Recognizing this truism, *Noerr* precluded liability for a fraudulent scheme to deceive "both the general public and the truckers' existing *customers*," and to

injure "relationships existing between the truckers and their *customers*." 365 U.S. at 129, 133 (emphases added). Since "[i]t is inevitable" that public-policy campaigns will reach potential customers, holding that such core speech can be proscribed under a statute prohibiting commercial harm would "be tantamount to outlawing all such campaigns"—a result intolerable under the First Amendment. *Id.* at 143-44; *see also id.* at 139 (First Amendment prohibits "disqualify[ing] people from taking a public position on matters in which they are financially interested"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983) ("[T]he full panoply of protections [is] available" to a company's "direct comments on public issues."); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (Court's landmark cases "would be little more than empty vessels" "[i]f a profit motive could somehow strip communications of ... constitutional protection.").

The speech here is not directed at consumers to attract their money, since no marketing campaign would espouse themes like cigarettes "are not as addictive as cocaine" and have "not been scientifically proven to harm nonsmokers." Rather, as the Petition detailed, the district court repeatedly found that Defendants' "fraud" was designed to "forestall indoor air restrictions" and other "government regulation" and made in "response to various accusations by public health authorities." Pet. 15-16.

c. Factual Assertions — The Petition established that "opinions" and "semantic ambiguities" cannot be penalized under either the fraud statutes or the First Amendment, that the condemned secondhand-smoke statements were opinions about an ongoing scientific debate, and that the "addiction" statements were a

semantic dispute with the Surgeon General about how to label tobacco's withdrawal symptoms. Pet. 20-23. Remarkably, the Government does not dispute this dispositive legal point, but simply repeats that the district court made "extensive factual findings" that defendants' opinions and semantic preferences were somehow "false." Opp. 36. But since the statements were not factual assertions amenable to punishment, the district court was without power to penalize or enjoin Defendants' opinions *regardless* of how many "findings" it made on the metaphysical question of whether they were "deliberately false" or uttered in "good faith." Pet. App. 50a. As evidenced by the Solicitor General's tactical retreat here, the D.C. Circuit's expansion of the fraud statutes to reach opinions and semantic ambiguities is irreconcilable with the precedent of this Court and at least four other circuits. Pet. 20.

B. Lights

The Government does not seriously respond to the Petition on "lights" descriptors. The Government does not dispute that one "reasonable interpretation" of the descriptors does *not* imply a health benefit and thus Defendants' statements would be immune from fraud liability in at least six circuits. Pet. 20 n.7; 30. None of those circuits allows liability for statements that are true (under one interpretation) based on what defendants purportedly "knew and intended" regarding the statements, Opp. 50.

The Government also implicitly concedes that, if the descriptors did imply a health benefit, this would simply echo the message of the "tar ratings" concededly authorized by the FTC (for many years after the Commission was fully aware of "compensation" and after this trial concluded)—*i.e.*,

that low tar ratings equate with healthier cigarettes. Thus, as the Government also does not dispute, it cannot prosecute descriptors as fraud because the "tar ratings" were approved by an expert agency. Pet. 31-33. (The Petition plainly did not contend that the FTC approved the "*descriptors themselves*," but only the undisputed point that "the FTC approved the Cambridge Method [tar] ratings being described." Pet. 33-34.)

Finally, there is nothing to the Government's absurd suggestion that fraud was found here because the descriptors purportedly did not accurately reflect the tar ratings for one cigarette in one year. *See* Opp. 51, Pet. App. 1907a. Otherwise the courts below would have banned descriptors only to the extent they did *not* accurately reflect tar ratings, rather than banning them completely because they do accurately describe those ratings and thus "falsely" imply a link between the ratings and health.[1]

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[1] The Government also offers no meaningful response to the demonstrated errors infecting the corrective statements remedy. *See* Pet. 34-36; *see also Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (rejecting compelled speech on product because it "communicate[d] a subjective and highly controversial message").

CONCLUSION

The petition should be granted.

Respectfully submitted,

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